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No. 249.

Brf. of Atty. Gen'l. (Knapp, Wickersham & Davis for)

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
AUSTIN NICHOLS & Co. } No. 249.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

This case involves the dutiable classification of certain glass bottles under the tariff act of 1894. The stipulation in the circuit court of appeals shows that the bottles in question hold not more than 1 pint, were imported filled with merchandise, which was liable to ad valorem duties, and were assessed for duty at the respective ad valorem rates applicable to their contents as a part of the value of the same. The protest claimed that the articles are free of duty on the ground that the words, "whether filled or unfilled, and whether their contents be dutiable or free," in paragraph 88 of the act, do not refer to these articles, undertaking to justify this claim by an untenable appeal to executive practice and section 2898,

Revised Statutes; and on the further ground that paragraph 248, taxing ginger ale or ginger beer at 20 per cent ad valorem, without "separate or additional duty * * * on the bottles," exempts bottles containing those beverages. The protest made the alternative claim that if not free of duty, the articles are dutiable at 40 per cent ad valorem under the last clause of paragraph 88 or under paragraph 89 or 90. As the protest is not in the record, I quote the portion which makes this claim, viz:

> It is further claimed as to such of said articles as have been assessed with a duty amounting to more than 40 per cent ad valorem, that if not free of duty, or dutiable as aforesaid, they are dutiable at only 40 per cent ad valorem under the last part of said paragraph 88 as "glassware," or under paragraph 89 or 90 of the same act.

The words "or dutiable as aforesaid" appear to refer to other articles embraced in the earlier stages of this proceeding.

The Board of General Appraisers, in an unpublished decision, found that the articles were treated by the collector as the usual coverings of the merchandise contained, and were improperly assessed as part of the same under section 19 of the customs administrative act, and sustained "the protest claiming that the bottles containing 1 pint or less were dutiable at 40 per cent ad valorem, under the last part of said paragraph 88," citing *In re Grace*, 79 Fed. Rep., 315, and G. A., 3964.

The petition on appeal made the following assertion:

> The protest in question made no claim that a duty of 40 per cent ad valorem should be assessed on said bottles, etc., and the Board of Appraisers exceeded their powers in ordering a reliquidation to that effect.

The record in the case below does not sustain this assertion. As just pointed out, the importers' protest made the alternative claim that 40 per cent ad valorem was the proper tax under the last part of paragraph 88 or under paragraph 89 or 90. The query here arises whether if one claim of the importers has been sustained, they are in a position to appeal and may abandon that claim and urge on appeal their extreme claim.

It has been decided that one party can not take advantage of another party's appeal, (*United States* v. *Lies*, 170 U. S., 628). For similar reasons a party who has really exhausted his appeal because on one ground of complaint he has been sustained, should not be permitted to carry further another and extreme claim on which he has failed. Let the importer stand on a single claim, or else accept a favorable result on one of several claims, even if less advantageous than such a result on his main claim. He should be compelled to shoulder the burdens with the advantages of alternative or multiple grounds of protest. It must be said, however, that the importer's right to take this course was sustained in *Koechl* v. *United States* (91 Fed. Rep., 110).

The circuit court reversed the board as to the articles before the court, and decreed that—

> All filled bottles or vials holding not more than 1 pint are exempt from duty irrespective of the nature or dutiable character of their contents.

On appeal by the United States to the circuit court of appeals, that court certified here the following question:

> Should the value of the bottles filled with ad valorem goods be added to the dutiable value of their contents, under section 19 of the customs administrative act of 1890, to make up the dutiable value of the imported merchandise?

Several similar cases were argued below with the present one, but no testimony seems to have been taken in any of them.

Thus it appears that besides the question of procedure, or of the limitation of the right of appeal, sufficiently raised by the third and general assignment of error below, viz: "In that it [the circuit court] did not in all things affirm the decision of the board," etc, the case involves a settlement of classification between—

(1) The application of section 19 of the customs administrative act, which assesses duty when ad valorem on market value or wholesale price, "including the value of all cartons, crates, boxes, sacks, and *coverings of any kind.*" This was the collector's classification.

(2) Paragraph 88 of the Wilson Act, taxing "* * * glass bottles holding more than one pint, * * *

whether filled or unfilled, and whether their contents be dutiable or free, * * * and vials holding not more than one pint and not less than one-fourth of a pint, one and one-eighth cents per pound; * * * *all other plain green and colored, molded or pressed, and flint lime and glassware, 40 per cent ad valorem.*" The Board of General Appraisers classified the articles under the last clause.

(3) The claim that these bottles are not subject to any duty, because bottles holding not more than 1 pint and imported filled are not dutiable under paragraph 88 aforesaid, and filled bottles are not within the intent or meaning of section 19 of the customs administrative act. This was the importers' extreme claim, to which there were alternatives, as pointed out, and one of the alternatives had been sustained by the board.

Now, although the question certified brings only a particular aspect of the case before the court, since the assignments of error below stand especially on paragraph 88 of the act of 1894, I presume it will be proper to state the argument on all branches of the case as an aid to the proper reply to the circuit court of appeals. Indeed, it is the question of that court which has brought back into the case, so to speak, the original classification of the collector under section 19 of the customs administrative act.

ARGUMENT.

I.

AS TO SECTION 19 OF THE CUSTOMS ADMINISTRATIVE ACT.

There can be no doubt that bottles are coverings, and the usual coverings, of their contents. The Government does not contend that they are dutiable under section 19 as unusual forms of coverings which are to be subjected to an additional duty whether the contents are dutiable or free. Being the usual coverings, then, they must be dutiable under section 19 on their value added to the value of the contents, whatever they may be, and at the same rate as the contents, unless other provisions of law specifically subject them to duty or clearly exempt them from duty. Section 19 (so far as regards *usual* coverings) only applies to the coverings of merchandise subject to an ad valorem rate of duty, and the question certified and the stipulation below show that such was the character of the merchandise here.

In *United States* v. *Dickson* (73 Fed. Rep., 195) the court said: "Ordinarily, bottles may properly be considered as coverings of their contents and treated accordingly." And in *United States* v. *Ross* (91 Fed. Rep., 108) similar filled bottles were held to be usual and necessary coverings.

The Government does not now contend that bottles holding 1 pint or less and containing ginger ale are dutiable as coverings, because paragraph 248 of the act of 1894, assessing a duty of 20 per cent on ginger ale, provided that no separate or additional duty

shall be assessed on the bottles. This was a special exemption, and the Government acquiesced in the decision in the Dickson case, holding, in effect, that to add the value of the bottles to the value of the goods, under section 19, was assessing an additional duty in the face of the prohibition of paragraph 248. Another instance of a similar exemption is seen in paragraph 244, as to still wines, containing the clause "but no separate or additional duty shall be assessed on the bottles or jugs."

Nor does the United States resist the decision in *United States* v. *Ross* (91 Fed. Rep., 108), holding that similar bottles were free of duty, the beverage contained being on the free list. But we do contend that where there is no special exemption, as in the ginger ale case, and where the contents of the bottles are subject to an ad valorem duty, they are properly dutiable under section 19.

If these bottles are usual coverings and contain goods free of duty or subject to a specific rate (*United States* v. *Leggett*, 66 U. S., 300), or if the bottles are specifically exempted, they are free; but otherwise, and if they contain ad valorem goods, they are dutiable at the rate assessed upon their contents; their value constitutes a part of the dutiable value of the goods. It is not too much to say that even if the bottles are not coverings (which can hardly be contended), their value must, under section 19, be included in the "expenses incident to placing the merchandise in condition, packed ready for shipment to

the United States." In short, if pint bottles containing free goods are free as the usual coverings of such merchandise, it is difficult to see why similar bottles containing ad valorem goods should not be treated as usual coverings also and be dutiable accordingly.

In *Merck* v. *United States* (99 Fed. Rep., 432) the report seems to be inaccurate, as the second clause of the syllabus obviously should read, "bottles holding *not* more than 1 pint of merchandise, subject to an ad valorem duty, are not themselves subject to duty." There is a corresponding error in the body of the opinion, which certainly intended to attribute the importer's admission of dutiability, under paragraph 88, to bottles holding *more* than 1 pint rather than to bottles holding *not* more than 1 pint. But, taking the correct form of the syllabus statement as suggested, we contend that Judge Townsend is mistaken in saying that the Ross and Dickson cases sustain the contention that pint bottles holding ad valorem merchandise are not themselves subject to duty, for the Dickson case held this view only because of the special exemption applicable to ginger ale, and the Ross case followed that view simply because the soda water contained was on the free list.

The development of the statutes as to coverings is as follows:

Section 24 of the act of June 30, 1864 (13 Stat., 202), provided that the actual value of the goods was to be ascertained by adding the value of the covering. This section was repealed by the act of March 3, 1865

(13 Stat., 491), but was restored by section 9 of the act of July 28, 1866 (14 Stat., 328), and the latter section was incorporated into the Revised Statutes as section 2907, and continued in force until repealed by section 7 of the act of March 3, 1883 (22 Stat., 488). Section 19 of the customs administrative act restored the provisions of the act of 1864, but limited the inclusion of the value of coverings in the value of the goods to cases where the goods are subject to an ad valorem duty. This is, of course, the reason why coverings are claimed to be free of duty so far as section 19 is concerned when the duty is specific.

Thus it appears that the rule of section 19 is an established principle in customs statutes, and unless and so far as the later tariff act of 1894 expressly exempted such articles, or explicitly or by necessary consequence subjected them to a different assessment of duty, section 19 must include them. The argument that bottles, although coverings, had always been provided for *eo nomine* in tariff acts is subject to the qualification that the question depends upon the tariff act in force at the time. The acts of 1883 and 1890 might by reason of their explicit terms cover any given bottles as coverings, but under the act 1894 that question would depend upon the terms used. Certainly, if articles are not covered *eo nomine*, although previously so covered, the claim that they are free of duty on this ground is not to be commended when there is a general provision of law in force at the time apt and sufficient to cover them. Under the tariff of

1883, paragraphs 133 and 134, there was a duty of 30 per cent ad valorem on green and colored glass bottles and vials, if filled and not otherwise provided for; and a duty of 40 per cent ad valorem under the same conditions on flint and lime glass bottles and vials. Under the act of 1890, paragraphs 103 and 104, the duty became specific and the distinction of capacity appeared, the duty being higher on the containers of less capacity; and where filled and the contents subject to ad valorem duty, the value of the bottles, etc., was to be added to the value of the contents. The various vessels were dutiable as if empty, unless otherwise provided for, a minimum rate of duty, however, of 40 per cent ad valorem being imposed. Paragraph 88 of the act of 1894 undertook to combine paragraphs 103 and 104 of the act 1890, but left the real meaning and intent somewhat ambiguous, while paragraph 99 of the act of 1897 cleared up the ambiguities.

A consideration of all these provisions makes it plain, I think, that bottles not expressly relieved of duty have always been taxed, even when filled, so far as the intention of Congress is concerned, whether their contents were dutiable or free, and whether the duty on the contents was ad valorem or specific. So that even if the effect of judicial decisions has been to relieve certain filled bottles, notwithstanding this general intent, the argument is strong that the application of the coverings provision of section 19 to the bottles here is in accordance with this intent and should be applied.

This leads to a more careful consideration of section 88 of the tariff act of 1894.

II.

AS TO PARAGRAPH 88 OF THE TARIFF ACT OF 1894.

There are certain questions involved in this paragraph up to the last clause on which the Government desires to make no contest, having accepted adverse decisions of lower courts. For instance, the case of *United States* v. *Ross* (*supra*) held that the clause "whether filled or unfilled, and whether their contents be dutiable or free" applies only to the preceding enumeration and does not include filled pint bottles. The Ross case refers to another such settled point, viz, whether "vials" in paragraph 88 includes bottles. It is difficult to understand why, as the act itself attaches to the word "vials" the pint measure of capacity, pint bottles are not included. But the Grace case decided that *empty* pint bottles were dutiable under the final clause of paragraph 88 and not as vials under the previous clause. It will be observed that the court in the Ross case erroneously stated that the Grace case held that pint bottles were dutiable as "vials."

It is thus no longer pertinent to contend that, while vials usually mean very small glass containers, that implication as to their size is repelled by the pint measure of capacity which the law imposes on the term, because the distinction of the courts, accepted by the Government, is that "vials" does not include bottles, since the former term is more generally understood to

be a kind of bottle used principally by druggists and chemists. (Grace case *ut supra.*)

We come, then, to the last clause of paragraph 88, which imposes a duty of 40 per cent ad valorem on all other plain, etc., and flint and lime glassware. There can be no doubt that this provision covers bottle glassware. The Board of General Appraisers in G. A. 2952 decided that the term "glassware" in paragraph 88 included *only* bottle glassware. However that may be, bottles are certainly covered by this general catch-all clause of that paragraph which refers particularly to bottles. In G. A. 2952 the board thought that Congress did not intend that pint bottles, etc., were to be subject to the same rate of duty when imported filled as if imported unfilled. But while they held that the bottles there were entitled to free entry, this seems to have been because the contents were subject to a specific duty, and the board by no means decided that bottles imported filled are not subject to duty. This is evident from their decision in the present case, which relied upon G. A. 3964. There the merchandise contained in the bottles was entitled to free entry, but regarding the bottles, the Board say that the Grace case "decided that such bottles when imported empty were dutiable at 40 per cent ad valorem under the last clause of paragraph 88, act of 1894;" that the Dickson case decided that bottles were excluded from the provisions of section 19 of the customs administrative act. "Hence we hold that inasmuch as said bottles are articles of merchandise *expressly provided for in paragraph*

88, *act of 1894*, they are subject to duty at 40 per cent ad valorem thereunder, it not being deemed material by us whether they were imported filled or empty."

We submit the argument on the final portion of paragraph 88 to the court, because the Government's position properly is that such bottles are necessarily dutiable under one of the two provisions of law which have been invoked, and are not entitled to free entry. The assignment of errors below shows that the Government challenged the circuit court's decision that paragraph 88 did not apply, and as the question of the circuit court of appeals presents section 19, and necessarily involves a discussion of the entire case, both paragraph 88 and section 19 are properly before the court in reaching the correct settlement of classification.

Opposing counsel argued below that the precise issue here involved was settled in *Merck* v. *United States* (99 Fed. Rep., 432). As we have pointed out above, there are inaccuracies in the report of that case, and apparently a mistaken conception by the court of other cases, which leaves it as a dubious authority. This dubiousness has a bearing upon the Government's acquiescence therein, which quite possibly was intended to apply only to bottles holding more than 1 pint or containing free goods or goods subject to a specific duty, to which the syllabus incorrectly limits the case. At all events, the Government evidently considered its acquiescence in that case as not to be extended to other cases, for the appeal in the present case and three other cases heard with it was promptly directed and prosecuted soon thereafter.

III.

AS TO THE CLAIM THAT THE BOTTLES ARE EXEMPT FROM DUTY IRRESPECTIVE OF THE NATURE OR DUTIABLE VALUE OF THE CONTENTS.

Counsel conceded in the court below that filled bottles have commonly been subjected to a duty, but appeals to the Ross, Dickson, and Leggett cases as showing exceptions. We have sufficiently commented on those cases as presenting obvious distinctions and explaining the reason for the particular exception, and contend that in the intent of Congress filled bottles have always been subjected to duty unless the exception in the act was clear and specific. Counsel also conceded below that the coverings of merchandise dutiable at ad valorem rates have commonly been subjected to the same duty as their contents, but adds that this has not been so invariably, referring to section 7 of the tariff act of 1883. Nevertheless, this rule has generally been in force, was finally established in the customs administrative act, and the tariff act of 1894 consequently omitted the provision of the act of 1883.

The case, then, comes down to this: While vague and doubtful interpretations of taxing laws are to be resolved in favor of the citizen, this principle does not mean that in a tariff act recognizing in large measure the protective principle as well as providing for revenue necessities, with duty schedules and a free list generally following prior laws, notwithstanding various changes in details, articles ordinarily taxed may escape

all duty simply because there is some doubt which of two provisions for duty attaches to them. While we do not contend that an article not provided for at all is not entitled to free entry simply because it is not enumerated in the free list, yet we do say that Congress uniformly places in the free list all articles which it manifestly intends shall not pay duty, and that the presumption that an article is free ought not to carry a claim very far unless the presumption is fortified by sound and strong reasons. As a rule, bottles have been specifically dutiable in our tariffs, whether they were filled or unfilled, and as a rule the usual coverings of ad valorem goods have been dutiable, as much as the unusual coverings of any goods. This statement presents accurately the scope and purpose of all our tariff laws on the present subject. When Congress has wished to exempt certain filled bottles, they have done so explicitly, as in the case of ginger ale and still wines under the act of 1894; and the lower courts have construed the law so as to relieve bottles covering free goods, or bottles covering goods specifically dutiable—a result not clearly justifiable, although accepted by the Government. Under these circumstances it is difficult to perceive why filled bottles of the dimension presented, containing ad valorem goods, are entitled to free entry. The Government submits that the claim is irresistible that the last portion of paragraph 88 seizes them, whether they are filled or unfilled; for, as stated, when Congress wishes to exempt filled bottles it does so plainly; or else that section 19

of the customs administrative act seizes them, especially since the inference from that section has been used by the courts to justify the escape from duty when the goods were not ad valorem—that is, when they were subject to specific duty or free.

It is to be remarked that the question of the circuit court of appeals is general and applies to bottles holding more than 1 pint as well as to those holding 1 pint or less. As to the larger bottles, there can not be the slightest doubt that the first portion of paragraph 88 clearly and specifically embraces them, and this, because more specific as to such bottles, excludes the application of section 19. The importers have necessarily accepted this result under decisions of the board and the courts. The point is too clear for argument, and accordingly in G. A. 2952, *ante*, holding certain bottles entitled to free entry, the board state that the words "whether filled or unfilled," etc., apply to all of the enumerated articles preceding the same. And in *Merck* v. *United States* (99 Fed. Rep., 432) Judge Townsend's statement as to the importer's admission of dutiability evidently refers to bottles holding more than 1 pint. (See also *United States* v. *Ross*, 91 Fed. Rep., 108.)

Opposing counsel relies upon the Dickson case as declaring with a broad implication that when the customs administrative act was passed Congress was not ignorant of the fact that bottles were already, except when specially exempted, specifically dutiable. Having thus, satisfactorily to himself, avoided the

application of section 19 to these coverings, he then proceeds to argue and maintain that while many other bottles may be specifically dutiable, this particular class of bottles is not. What the Government urges is that these bottles are either specifically dutiable under the last portion of paragraph 88, or else dutiable as coverings under section 19 of the customs administrative act, and that any doubt as between these provisions does not warrant their escape from duty.

What these bottles contained does not appear in the record here or below, but the Government concedes that the present argument is not applicable to any such bottles which may have contained ginger ale. (Par. 248.) Probably the same concession should be made in case any bottles contained still wines, etc., provided for in paragraph 244.

I therefore submit that the question of the circuit court of appeals should be answered in the affirmative; or, if answered in the negative, that this court should, in addition to such answer, instruct that court that the goods in question are to be classified under the concluding clause of paragraph 88. I submit that in either event the decision of the circuit court that such bottles are exempt from duty, irrespective of the nature or dutiable value of their contents, should be reversed.

HENRY M. HOYT,
Assistant Attorney-General.

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